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Letter dated 14 December 2001 from the Chairman of the Security Council Committee established by resolution 1373 (2001) concerning counter-terrorism addressed to the President of the Security Council

Please find attached the notes on a presentation given to the Committee concerning counter-terrorism by the Director of the New York Office of the Office of the High Commissioner for Human Rights, Mr. Bacre Waly Ndiaye, on 11 December (see annex).

I should be grateful if you would have the text of this letter and its annex circulated as a document of the Security Council.

(*Signed*) Jeremy **Greenstock**
Chairman
Committee concerning Counter-Terrorism

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Annex

[Original: English]

Address by Bacre Ndiaye
Director of the New York Office
Office of the High Commissioner for Human Rights

On behalf of the High Commissioner for Human Rights, I should like to thank you for inviting the Office of the High Commissioner for Human Rights to discuss with you the human rights implications of Security Council resolution 1373 (2001).

Terrorism is a threat to peace, stability, freedom and democracy. The High Commissioner for Human Rights has repeatedly condemned all forms -and manifestations of terrorism. Security Council resolution 1373 (2001) has correctly underscored the responsibility of all Governments to eradicate terrorism. While pursuing this important objective, efforts must be made to avoid innocent people becoming the victims of counter-terrorism measures. This requires that States strictly adhere to their international obligations to uphold human rights and fundamental freedoms. Yesterday, on the occasion of human rights day, 17 special rapporteurs and independent experts of the Commission on Human Rights issued a joint statement reminding States of their obligations under international law to uphold human rights and fundamental freedoms in the context of the aftermath of the tragic events of 11 September 2001.

Respect for the rule of law and human rights is the best way to prevent terrorism. As the body entrusted with monitoring the implementation of Security Council resolution 1373 (2001), States will be reporting to the Committee by 28 December 2001 on the steps they have taken to implement the resolution. During this exercise, we hope that the Committee will assist States in ensuring the compatibility of the measures taken under Security Council resolution 1373 (2001) with States' obligations under human rights law. On our part, the Office of the High Commissioner for Human Rights is committed to advising Governments on the content of human rights standards in the light of international norms and jurisprudence that may be relevant in the context of anti-terrorism measures.

Human rights law strikes a fair balance between legitimate national security concerns and fundamental freedoms. It requires that certain rights not be derogated from under any circumstances.[1] These include the right to life, freedom of thought, conscience and religion, freedom from torture or cruel, inhuman or degrading treatment, and the principles of precision and of non-retroactivity of criminal law except where a later law imposes a lighter penalty. For other rights, derogation is only permitted in the special circumstances defined in international human rights law; it must be of exceptional character and carefully weighted. Any such measures must be strictly limited in time and substance to the extent required by the exigencies of the situation, and subject to regular review. The process of adopting derogations must be consistent with established national and international procedures and mechanisms.

[1] For instance, the International Covenant on Civil and Political Rights.

Even during an armed conflict, measures derogating from treaties such as the International Covenant on Civil and Political Rights are permitted only if and to the extent that the situation constitutes a threat to the life of the nation.[2] Even then, States should carefully consider the reason why such a measure is necessary and legitimate in the circumstances. A list of elements that cannot be subject to lawful derogations have been recently clarified. These elements include the following: all those deprived of liberty must be treated with respect for their dignity; the prohibition of hostage-taking, abductions or unacknowledged detention; the protection of persons belonging to minorities; the prohibition of unlawful deportation or transfer of population; and that "no declaration of a state of emergency ... may be used as justification for a State party to engage itself ... in propaganda for war, or in advocacy of national, racial or religious hatred that would constitute incitement to discrimination, hostility or violence."[3]

The right to a fair trial is explicitly guaranteed under international humanitarian law during armed conflict. It has also been recently clarified that[4] any trial leading to the imposition of the death penalty during a state of emergency must conform to the provisions of the International Covenant on Civil and Political Rights, including those on fair trial. These include the right to equality before the courts and tribunals; the right to a fair hearing by a competent, independent and impartial tribunal; the presumption of innocence; the right to be informed promptly and in detail in a language which he or she understands of the nature and cause of the charge against him; the right to communicate with a counsel of choice; the right to examine witnesses and obtain the attendance and examination of witnesses on his or her behalf; and the right not to be compelled to testify against oneself or to confess guilt.

In addition, human rights law requires that, in the exceptional circumstances where it is permitted to limit some rights for legitimate and defined circumstances other than emergencies, the principles of necessity and proportionality must be applied. The measures taken must be appropriate and the least intrusive to achieve the objective. The discretion granted to certain authorities to act must not be unfettered. The principle of non-discrimination must always be respected and special effort made to safeguard the rights of vulnerable groups. Anti-terrorism measures targeting specific ethnic or religious groups would also be contrary to human rights law and would carry the risk of sparking a dangerous upsurge in discrimination and racism.

We are aware of the guidance for States prepared by the Committee on the reporting requirements under resolution 1373 (2001). To assist the Committee in its work and to avoid the misapplication of the resolution, the High Commissioner recommends that some "further guidance" to complement these guidelines be issued to assist States to comply with their international human rights obligations. Our

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[2] United Nations Human Rights Committee, General Comment No. 29CCPR/C/21/Rev.1/Add.11. Available on the web site of the Office of the High Commissioner for Human Rights under Treaty-Bodies database.

[3] United Nations Human Rights Committee, General Comment No. 29CCPR/C/21/Rev.1/Add.11. Available on the web site of the Office of the High Commissioner for Human Rights under Treaty-Bodies database.

[4] General Comment No. 29CCPR/C/21/Rev.1/Add.11. Available on the web site of the Office of the High Commissioner for Human Rights under Treaty-Bodies database.

suggested "further guidance", which are based on States' obligations under international human rights law, are available to the Committee members here today.

The misapplication of Security Council resolution 1373 (2001) could lead to unwarranted infringement on civil liberties. There is evidence that some Governments are now introducing measures that may erode core human rights safeguards. In some countries, non-violent activities have been considered as terrorism, and excessive measures have been taken to suppress or restrict individual rights, including the presumption of innocence, the right to a fair trial, freedom from torture, privacy rights, freedom of expression and assembly, and the right to seek asylum. This was clearly not the aim of the Security Council when it passed resolution 1373 (2001) and it is important to ensure that such unintended and undesirable consequences of the global effort against terrorism are avoided.

Paragraph 6 of Security Council resolution 1373 (2001) refers to the Committee's role in monitoring the implementation of the resolution, "with the assistance of appropriate expertise". We are aware that the Committee has indicated its intention to seek expertise principally in the following areas: legislative drafting, financial law and practice, customs law, immigration law, extradition law, police and law enforcement work and illegal arms trafficking. Several of these areas have a strong human rights dimension. Owing to the serious human rights concerns that could arise from the misinterpretation of Security Council resolution 1373 (2001), the High Commissioner urges the Committee to ensure that some of those assisting it in its crucial monitoring task have strong human rights expertise. The High Commissioner is ready to assist the Committee in identifying such experts.